

Signet Testing Laboratories, Inc. and International Union of Operating Engineers, Local 12, AFL-CIO, Petitioner. Case 21-RC-19989

October 18, 1999¹

DECISION AND ORDER DIRECTING HEARING

BY MEMBERS FOX, LIEBMAN, AND BRAME

The National Labor Relations Board, by a three-member panel, has considered objections to and determinative challenges in an election held December 11, 1998, and the Acting Regional Director's report recommending disposition of them. The election was held pursuant to a Stipulated Election Agreement. The tally of ballots shows 4 votes cast for the Petitioner, 5 cast for the Intervenor,² and 1 against both labor organizations, with 11 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the Regional Director's recommendations³ except that we find that the challenges to the ballots of Richard Aguirre, Kenneth James Greene, Steve Miller, Paul Moberly, Keith Armas Panttaja, Charles Ramsey, William John Reeves, John B. Starr, Keith Stephenson, and Conrado Tulagan, raise substantial and material factual issues warranting a hearing pertaining to the eligibility of these challenged voters under the construction industry formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified in 167 NLRB 1078 (1967), and *Steiny & Co.*, 308 NLRB 1323 (1992).

The Acting Regional Director recommended that certain issues raised by the challenges to the ballots of the above-named individuals can best be resolved by a hearing and thus ordered that a hearing be held to determine if they were eligible employees. (See fn. 1.) The Acting Regional Director rejected the Petitioner's argument that a hearing also should be held on whether these challenged voters were eligible under the construction industry eligibility formula. The Petitioner excepts to the Acting Regional Director's failure to set for hearing the is-

sue of the eligibility of the above challenged voters under the construction industry formula set forth in *Daniel*, supra, and *Steiny*, supra. We find merit in the Petitioner's exception.

The construction industry eligibility formula set forth in *Daniel* and *Steiny* applies to all employees in the construction industry. Specifically, in *Steiny*, the Board held that the construction industry eligibility formula applies to all construction industry elections unless the parties stipulate not to use it. *Steiny*, supra at 1327-1328 and fn. 16. In the instant case, it is not disputed that the Employer is in the construction industry. Further, the parties did not affirmatively state in the Stipulated Election Agreement that the *Daniel/Steiny* formula would not apply. Contrary to the Acting Regional Director, and in light of the express language of *Steiny*, supra, we conclude that the language in the Stipulated Election Agreement does not constitute an express stipulation by the parties not to use the *Daniel/Steiny* formula.⁴ Therefore, we find that a hearing should be held to determine whether the challenged voters, with the exception of Kirk, are eligible to vote under the *Daniel/Steiny* formula.

ORDER DIRECTING HEARING

IT IS ORDERED that a hearing be held before a duly designated hearing officer for the purpose of receiving evidence to resolve the issues raised by the Petitioner's Objections 1 and 2, and the challenges to the ballots of Richard Aguirre, Kenneth James Greene, Steve Miller, Paul Moberly, Keith Armas Panttaja, Charles Ramsey, William John Reeves, John B. Starr, Keith Stephenson, Conrado Tulagan, and William Kirk.

IT IS FURTHER ORDERED that a hearing officer designated for the purpose of conducting the hearing shall prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, finding of fact, and recommendations to the Board as to the disposition of the issues. Within the time prescribed by the Board's Rules and Regulations, Series 8, as amended, any party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately on the filing of such exceptions, the party filing the same shall serve a copy on the other party and shall file a copy with the Regional Director. If no exceptions are filed, the

¹ The Board's previously issued Decision and Order Directing Hearing in this case inadvertently was not published for inclusion in the Board's bound volume. It was included on February 22, 2000.

² The Intervenor in this proceeding is Southern California Conference of Carpenters and its District Councils and Local Unions, AFL-CIO.

³ In the absence of exceptions, we adopt pro forma the Acting Regional Director's recommendations that the issues raised by the Petitioner's Objections 1 and 2; and the issues raised by the challenges concerning whether William Kirk is an ineligible voter because he is not a unit employee, whether Richard Aguirre is a supervisor within the meaning of the Act, and whether Aguirre, Kenneth James Greene, Steve Miller, Paul Moberly, Keith Armas Panttaja, Charles Ramsey, William John Reeves, John B. Starr, Keith Stephenson, and Conrado Tulagan were temporarily laid off with a reasonable expectation of recall, can best be resolved after a hearing.

⁴ Member Brame's dissent cites *D & M Sheet Metal, Inc.*, 273 NLRB 654 (1984), for the proposition that when parties enter into a Stipulated Election Agreement which contains only the standard eligibility formula rather than the *Daniel/Steiny* construction industry formula, and no party contends that such a formula was contemplated when the agreement was approved, the agreement to use the standard formula is proper and should be given effect. We do not find *D & M Sheet Metal*, supra, dispositive because it preceded *Steiny & Co.*, supra, which clearly holds that the parties must specifically stipulate not to use the *Daniel* formula for it not to apply in a construction industry context.

Board will adopt the recommendation of the hearing officer.

IT IS FURTHER ORDERED that the above-entitled matter is remanded to the Regional Director for Region 21 for the purpose of arranging such hearing.

MEMBER BRAME, dissenting.

Contrary to my colleagues, I agree with the Acting Regional Director that the express language of the Stipulated Election Agreement between the parties should govern. The parties' Stipulated Election Agreement contains the standard eligibility formula. It states that the only employees who were eligible to vote were "of employees employed during the payroll period . . . including employees who did not work during that period because they were ill, on vacation, or temporarily laid off, employees engaged in an economic strike which commenced less than 12 months before the election date . . . and employees in the military." The Agreement neither stated that also eligible to vote would be those employees eligible under the construction industry eligibility formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified in 167 NLRB 1078 (1967), and *Steiny & Co.*, 308 NLRB 1323 (1992), nor referred in any manner to the construction industry eligibility formula. Moreover, neither party contended that the use of the *Daniel/Steiny* formula was contemplated at the time the Agreement was approved.

The Board has previously, in similar circumstances, applied the standard eligibility formula in an election in the construction industry. In *D & M Sheet Metal, Inc.*,

273 NLRB 654 (1984), the Board found that when parties enter into a Stipulated Election Agreement which contains only the standard eligibility formula and not the *Daniel/Steiny* construction industry formula, and when no party contends that such a formula was contemplated when the agreement was approved, the agreement to use the standard eligibility formula is proper and should be given effect. I would follow *D & M Sheet Metal, Inc.*, supra, here, and find that the language of the Stipulated Election Agreement should be given effect despite the fact that the Employer is in the construction industry. To do otherwise, imposes on the parties stipulated election term to which they neither assented nor could have foreseen.

Under these circumstances, in agreement with the Acting Regional Director, I would find that the plain language of the parties' agreement evinces their intent to use the standard eligibility formula rather than the special formula articulated in *Daniel and Steiny*. Therefore, I would hold the parties to the terms of the agreement,¹ and I would find it unnecessary to consider whether Richard Aguirre, Kenneth James Greene, Steve Miller, Paul Moberly, Keith Armas Panttaja, Charles Ramsey, William John Reeves, John B. Starr, Keith Stephenson, and Conrado Tulagan are eligible to vote under the construction industry eligibility.

¹ I note that there is no contention that the agreement is improper in any way.